

JOHN M. KAHENY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
CASEY G. GWINN
ASSISTANT CITY ATTORNEYS
STEVEN B. GOLD
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

John W. Witt

CIVIL DIVISION
202 "C" Street, Third Floor
SAN DIEGO, CALIFORNIA 92101-4184
TELEPHONE (619) 236-6220
FAX (619) 236-7215

September 6, 1996

REPORT TO THE COMMITTEE ON
NATURAL RESOURCES & CULTURE

FLUORIDATION OF WATER SUPPLY

BACKGROUND

On August 25, 1995, this office issued a Memorandum of Law concerning then-pending Assembly Bill ("AB") 733, which dealt with the fluoridation of public water systems. Based on existing case law, we concluded that the pending legislation probably would not preempt the initiative induced prohibition on fluoridation (San Diego Municipal Code section 67.00). However, we were quick to caution that preemption issues are uncertain without a judicial determination and recommended legislative modifications.

Since AB 733 became law without those recommendations, we now reexamine the effect of the bill in its final form and in light of the Committee's subsequent questions.

QUESTIONS

1. Does Assembly Bill (AB) 733 preempt San Diego Municipal Code ("SDMC") section 67.00?
2. Can the City proceed to fluoridate using local funds in light of AB 733's language limiting funding sources?
3. Does the language in AB 733 regarding The Public Utilities Commission ("PUC") approving rates apply to the City of San Diego?

SHORT ANSWERS

1. Since there is no actual conflict between current State law enacted through AB 733 and SDMC section 67.00, State law does not preempt our Municipal Ordinance prohibiting fluoridation of drinking water.
2. The City may not proceed to fluoridate using local funds because SDMC section 67.00 prohibits fluoridation. If SDMC section 67.00 was repealed or preempted, San Diego could proceed to fluoridate using local funds, despite AB 733's language limiting funding sources.

3. The PUC language does not apply to the City of San Diego since the City's water rates are not under the PUC's jurisdiction.

BRIEF HISTORY

San Diego Municipal Code section 67.00, which prohibits the fluoridation of our water, was initiated and adopted by the voters of San Diego at a Special Municipal Election held on June 8, 1954. Section 67.00 provides, in pertinent part:

It is . . . unlawful for any person, including the City of San Diego and [its elected officials or employees] to use in or add to the water supply of this City any Fluorine, Sodium Fluoride, Sodium Silico Fluoride or any Fluoride compound, or to treat such water supply with aforesaid chemicals before delivery to the consumers thereof.

AB 733, which conditionally mandates fluoridation of drinking water in the State, was passed into law on October 8, 1995, and became effective on January 1, 1996. The law applies only to water systems with: (1) at least 10,000 service connections, and (2) "funds . . . sufficient to pay the capital and associated costs [for the fluoridation system] from any source other than system's ratepayers, shareholders, local taxpayers, bondholders, or any other fees or charges levied by the water system." Health and Safety ("H&S") Code § 4026.8(a)(1)(A).

DISCUSSION

1. Preemption

A. Presently, No Actual Conflict, Thus No Preemption

Charter Cities, like San Diego, can have laws in conflict with State law which are nonetheless valid and enforceable. Johnson v. Bradley, 4 Cal. 4th 389, 398 (1992). However, when "the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related and narrowly tailored to its resolution," then the state statute preempts the local law. Id. at 399.

Before reaching the question of whether the subject is of statewide concern or a municipal affair, however, "the first step in a reviewing court's inquiry is to determine whether there is an 'actual conflict' between general state law and charter city authority." Id. at 400. If there is no "actual conflict . . . a choice between the conclusions 'municipal affair' and 'statewide concern' is not required." California Fed. Savings & Loan Assn. v. City of Los Angeles, 54 Cal. 3d 1, 16 (1991); Johnson v. Bradley, 4 Cal. 4th at p.399. In fact, the California Supreme Court has "observed that many of the cases decided under our Constitution's municipal affairs clause have not, on closer examination, presented an actual conflict between local and statewide law." Id. at 399. The Court

has "cautioned future courts to avoid unnecessarily entertaining substantive municipal affairs questions. . . ." Id. at 399.

Following our State Supreme Court's mandate to "avoid making . . . unnecessary choices [between state and local laws] by carefully insuring that the purported conflict is in fact a genuine one," Id. at 399, we must carefully examine whether an actual conflict exists between SDMC section 67.00 and AB 733. As previously stated, AB 733 requires fluoridation only for those jurisdictions with at least 10,000 service connections and with sufficient funds to pay the capital and associated costs of fluoridation without turning to the system's ratepayers, shareholders, local taxpayers, bondholders, or any other fees or charges levied by the water system. H&S § 4026.8(a)(1)(A). While San Diego has more than 10,000 service connections, there are insufficient funds to pay for fluoridation. According to Water Utilities Director George Loveland, Water Fund revenues are currently insufficient to fund already identified capital improvements, including mandatory and regulatory requirements. Therefore, it follows that the City has insufficient funds for fluoridation without raising rates, financing, or other fees.

AB 733 requires fluoridation only for those jurisdictions that can pay for such an improvement without an increase in rates, financing, or other fees. Since San Diego lacks Water Fund revenues for fluoridation, San Diego is exempt from AB 733's conditional mandate.

SDMC section 67.00 prohibits fluoridation, irrespective of funding availability. Even without SDMC section 67.00, available funds are insufficient to trigger AB 733's mandate. Therefore, no "actual conflict" exists between the two laws. Without an "actual conflict," AB 733 cannot preempt SDMC section 67.00.

B. If Funding Becomes Available, Then a Conflict Arises, Thus Probable Preemption

If funding for fluoridation became available through the State or private resource(s), then an actual conflict would exist between SDMC section 67.00 and AB 733. In that case, the issue of whether fluoridation of drinking water is a "statewide concern" or a "municipal affair" would likely be litigated, absent a repeal of SDMC section 67.00 by the voters.

In our Memorandum of Law, ML-95-61, dated August 29, 1995, the City Attorney concluded that "there is no clear definition by statute or case law of what matters are considered a 'statewide concern'," and that there is "uncertainty regarding whether the fluoridation of public waters is a matter of statewide concern." We further stated that if AB 733 "is adopted and the City chooses not to fluoridate its drinking water, then the matter may have to be litigated in court to assert the City's interest in preserving San Diego Municipal Code section 67.00." To eliminate this uncertainty, this office recommended the City seek an amendment to the bill, specifically allowing City sovereignty on this issue. Unfortunately, the bill was not amended, and AB 733 has become law, codified as Health and Safety Code sections 4026.7, 4026.8, and Public Resources Code section 21080.26.

Since the issuance of that Memorandum of Law, the courts have decided another preemption case which provides guidance in this area. The new case, Water Quality Association et.al. v. County of Santa Barbara et.al., 96 Daily Journal D.A.R. 4450 (1996), deals with the preemption of local water softener ordinances by State law.

Water Quality Association can be distinguished because, unlike the defendants in that case, San Diego is a Charter City. However, the facts that distinguish Water Quality Association from the San Diego situation are not dispositive in the court's decision. In Water Quality Association, the court relies on the underlying State statute dealing with water softeners, which declares, "the utilization of the waters of the state by residential consumers for general domestic purposes . . . is a right that should be interfered with only when necessary for specified health and safety purposes." Id. at 4450. The court found dispositive this language by stating, "[t]he phrase in the Act allowing interference for specified health and safety purposes would be meaningless if all it did was refer to a power already reposed in the City and District." Id. at 4454.

AB 733 similarly states, in part: "In order to promote the public health through the protection and maintenance of dental health, the department shall adopt regulations . . . requiring the fluoridation of public water systems." H&S § 4026.7(a). This office believes a court will likely find the State's regulation through AB 733 is for a specified health and safety purpose, i.e., dental health. In our opinion, should the City of San Diego ignore AB 733 based on a preemption argument, a court will likely find the legislative declaration in AB 733 persuasive, and decide the state can interfere to the exclusion of municipal regulation. In other words, we believe that in light of Water Quality Association, and the legislative pronouncement in AB 733, a court would likely find that fluoridation of drinking water is a matter of statewide concern.

The subject of the bill is clearly dental health, and matters involving public health can easily be construed as matters of statewide concern and not simply a municipal affair. While municipalities are authorized to enact ordinances dealing with health and safety pursuant to their police power, public health is by no means strictly a municipal affair. The state, too, has the duty to protect public health. Northern California Psychiatric Society v. City of Berkeley, 178 Cal. App.3d 90, 108 (1986); Lewis Food Co. v. State Department of Public Health, 110 Cal. App. 2d 759, 763 (1952). This duty is manifested in The United States Public Health Service's national campaign to fluoridate the water for 75 percent of all Americans by the year 2000. Testimony of Assembly member Jackie Speier before the Senate Health and Human Services Committee, June 21, 1995 at 1.

On the financial front, California also has a strong interest in fluoridation. Taxpayers will save approximately \$80 million each year in its DentiCal budget on tooth decay with fluoridation. Testimony of Assembly member Jackie Speier before the Senate Health and Human Services Committee, June 21, 1995 at 1-2. The State has also legislated other preventive health care measures such as statewide vaccination and immunization programs. See H&S §§ 120505 - 121555.

We must stress that contrary arguments can be made. As the California Supreme Court has expressly recognized, the "constitutional concept of municipal affairs . . . changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." Pacific Tel. & Tel. Co. v City & County of San Francisco, 51 Cal. 2d 766, 771, 775-776 (1959); see also Bishop v. City of San Jose, 1 Cal. 3d 56, 63 (1969). We believe the stronger argument supports fluoridation as a matter of statewide public health. Thus, should funding for fluoridation become available, an "actual conflict" will occur between AB 733 and SDMC section 67.00, and the State measure mandating fluoridation would likely be found to preempt a local prohibition such as Municipal Code section 67.00.

2. Voluntary Fluoridation

AB 733 provides that public water systems with at least 10,000 service connections (e.g., City of San Diego) are required to implement a fluoridation program only if funds to pay for such a program are available from a "source other than the system's ratepayers, shareholders, local taxpayers, bondholders, or any fees or charges levied by the water system." H&S § 4026.8(a)(1)(A), (B). While this language does not require the City to implement a fluoridation program unless other funding sources are available, nowhere does the statute prohibit paying for a fluoridation program through "the system's ratepayers, shareholders, local taxpayers, bondholders, or any fees or charges levied by the water system."¹ The statute was written with non-mandatory funding language allegedly because the bill would not have received the required vote had fluoridation been made a mandatory program. Hence, fluoridation from local funding is permissive but not mandatory.

So long as SDMC section 67.00 stands local funds cannot be used for fluoridation. Absent an actual conflict between SDMC section 67.00 and AB 733, or a repeal of SDMC section 67.00 by the voters, our local ordinance prohibits fluoridation of San Diego's drinking water.

3. PUC Language

Jurisdictions with utilities subject to PUC regulation must obtain PUC authorization before increasing utility rates. See Cal. Const. A. Art XII, Section 3 (Deerings 1981). To avoid the PUC approval process from acting as a stumbling block to the fluoridation program, AB 733 contains language requiring the PUC "to approve rate increases [relating to fluoridation] for an owner or operator of a public water system that is subject to its jurisdiction. . . ." H&S § 4026.8(h). In essence, the legislature abrogated the PUC's authority to regulate rate increases for implementing fluoridation required by AB 733.

¹In fact, the wording of H&S section 4026.8(h) demonstrates that the legislature specifically condones the raising of water rates to pay for fluoridation (i.e., "The Public Utilities Commission shall approve rate increases . . . to recover [the costs of fluoridation])."

The City's Water Utilities Department is not under the PUC's jurisdiction, however. County of Inyo v. Public Utilities Com., 26 Cal. 3d 154, 166 (1980). For this reason, H&S section 2026.8(h) does not apply to the City of San Diego.

CONCLUSION

AB 733 requires fluoridation of drinking water for drinking water systems with at least 10,000 service connections and with funds to pay for such a program without turning to the system's ratepayers, shareholders, local taxpayers, bondholders, or any other fees or charges levied by the water system. Since there are no such funds available to San Diego's water system, AB 733's mandate does not apply. For this same reason, SDMC section 67.00 is not preempted by AB 733. Therefore, absent a repeal by the voters, SDMC section 67.00 still prohibits fluoridation of San Diego's drinking water.

Respectfully submitted,

JOHN W. WITT
City Attorney

SBG:LHG:AMN:TLB:SHS:bf :pev:400 (043.1)
RC-96-36